JD–26–04
Wilkes Barre, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE FRANK MARTZ COACH COMPANY, INC.

and Case 4–CA–31070

AMALGAMATED TRANSIT UNION, DIVISION 1119
AFL–CIO, LOCAL 668[1]

Margaret M. McGovern, Esq., for the General Counsel.
Richard M. Goldberg, Esq., (Hourigan, Kluger & Quinn, P. C.), of Kingston, PA, for the Respondent.
Claiborne S. Newlin, Esq., (Meranze and Katz), of Philadelphia, PA, for the Charging Party.

DECISION

Statement of the Case

JOSEPH GONTRAM, Administrative Law Judge. This case was tried in Wilkes-Barre, Pennsylvania on December 17, 2003. The charge was filed by Amalgamated Transit Union, Division 1119 (the Union) on February 19, 2002. The complaint was issued on May 17, 2002, amended on December 17, 2002, and amended again at the hearing. The issues are as follows:

1. Did the Respondent implement a new safety policy without negotiating with the Union in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)?

2. Was the Respondent's new safety policy a factor in its discharge of employee, Albert Delsantro, and its suspension of employee Syndia Lieljuris?

3. Did the Respondent threaten an employee, in violation of Section 8(a)(1) of the Act, that it would eliminate safety bonuses for the bargaining unit employees because the Union was prosecuting the unfair labor practice charge in the present case?

4. Did the Respondent eliminate safety bonuses for its bargaining unit employees because the Union had filed and was prosecuting the unfair labor practice charge in the present case, in violation of Section 8(a)(4) and (1) of the Act?

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

[1] The General Counsel's unopposed motion to correct the caption to substitute Division 1119 for Division 119 is granted.

[2] The General Counsel's unopposed motion to correct the transcript is granted.

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is an interstate bus company and operates bus services from several locations in the United States, including a facility in Wilkes-Barre, Pennsylvania. During the past year, the Respondent received in excess of $50,000 in its interstate transportation services from its Wilkes-Barre facility. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

At all material times, Harold Pleiscott was the Respondent's chief executive operating officer, and Scott Henry, who reported to Pleiscott, was its president. Mark Chisdock is the Respondent's operations manager. Joseph Craig was a dispatcher prior to September 15, 2001; on that date he assumed the position of safety director. The Respondent admits that Pleiscott and Craig are supervisors and agents of the Respondent within the meaning of Section 2(11) and (13) of the Act. Thomas Carrigan was the Respondent's safety director until August 2001, when he left to join The Daecher Consulting Group. The Daecher Consulting Group provides consulting services for truck and bus companies. Carmen Daecher is the president and owner of The Daecher Consulting Group.

At all material times, the Union and the Respondent have been parties to a collective-bargaining agreement. William Davies works in the Respondent's Wilkes-Barre facility and is a driver. Davies is a member of the bargaining unit and was the president of the Union from 1999 to 2002. Albert Delsantro and Syndia Lieljuris were drivers in the Wilkes-Barre facility, and were members of the bargaining unit.

Before September 2001,[3] the Respondent had no policy regarding the discipline of drivers for accidents or other infractions. Discipline was administered haphazardly. In the spring of 2001, the Respondent's insurance carrier threatened to cancel the company's insurance unless it adopted a formal driver safety policy. Accordingly, Harold Pleiscott contacted Carmen Daecher and asked Daecher to make an assessment of the Respondent's safety management program. In a letter of March 22, Daecher outlined his agreement with the Respondent. Daecher agreed to perform certain services for the Respondent, including a review of company safety procedures and conditions. Daecher also agreed to assess corporate safety management and to make recommendations on corporate operations including safety operations.

From April to August, Daecher visited eight of the Respondent's facilities and attended two meetings for general managers. Daecher prepared a report, and on July 9, Daecher met with Pleiscott to discuss Daecher's findings. They also discussed Daecher's future involvement in the corporate safety program of the Respondent. They agreed that Daecher would, among other things, develop corporate policies and procedures for the Respondent, including disciplinary policies for drivers. Daecher would also regularly visit every operation of the Respondent, review employees' adherence to company policies, assist management in its safety efforts, and consult as needed with every operation and with corporate management. Daecher's charge for these services was estimated at approximately $50,000, depending on the

[3] All dates are in 2001 unless otherwise indicated.

level of consulting services that the Respondent requested.

The Respondent's retention of Daecher to overhaul its safety management program and to provide consulting services on a continuing basis was designed to accomplish two things: (1) to respond to and appease the concern voiced by its insurance carrier, and (2) to make an improvement in its safety record. In addition, the services of Daecher were intended to replace the services of the Respondent's in-house safety director, Thomas Carrigan. Indeed, Carrigan left his employment with the Respondent in August and joined Daecher.

On September 5, Daecher delivered to Pleiscott an initial draft of its proposed "Corporate Safety Policy and Tool Box." In October, Daecher and Pleiscott discussed the draft several times, and various revisions were made. The policy is quite comprehensive and covers such matters as driver management, vehicle management, environmental health and safety, accident reporting and investigation, return to work policy, and alcohol and controlled substance policy. No evidence was presented to show the type or nature of the revisions made by Daecher, whether the revisions were insignificant or substantial, or whether they included revisions to the disciplinary policy set forth in the safety policy. In any event, the safety policy was completed in October.

In January 2002, after discussions with Daecher, the Respondent implemented the safety policy. Notwithstanding all of the time and expense in the development of the safety policy, and notwithstanding the threat by the Respondent's insurance carrier to cancel its insurance coverage unless the Respondent adopted a safety policy, the Respondent maintains that it has never implemented the new safety policy developed by Daecher. Under all of the circumstances of this case, this contention is not credible. Moreover, Pleiscott provided an affidavit to the Board during its investigation of the present charges, and testified that the Respondent implemented the safety policy in January 2002. Pleiscott's affidavit testimony is consistent with the facts in this case, and is credited.

On September 14, driver Syndia Lieljuris was involved in an accident while driving the Respondent's bus into New York City. Craig decided that the accident was preventable. (A preventable accident was considered to be the fault of the driver.) Lieljuris began her employment with the Respondent in March 2000. This was Lieljuris' second preventable accident during her employment with the Respondent, the first having occurred in April 2000. During her employment with the Respondent, Lieljuris also had three nonpreventable accidents, one moving violation, and two driving incidents. (An incident is an occurrence where the damages and circumstances were not sufficiently serious to label it an accident.) She was given retraining in October 2000.

The Respondent held a meeting on September 20 to determine the discipline to be imposed for Lieljuris' accident. Craig, Chisdock, Davies, and Lieljuris were present at the meeting. Craig said that under the Respondent's new safety policy, suspension was the appropriate discipline. Davies asked Craig, "What safety policy are you referring to?" (Tr. 15.)[4] Craig responded that the Respondent was working on a new safety policy, but offered no further explanation. The parties then discussed the length of the suspension, and agreed on a 3-day suspension of Lieljuris during which she would attend retraining classes.

On September 26, Lieljuris filed two grievances with the Respondent in which she complained of the Respondent's failure to have a safety policy and the Respondent's

[4] References to the transcript of the hearing are designated as Tr.

implementation of a new safety policy and work rules without negotiating with the Union. Davies assisted Lieljuris in the preparation of these grievances. These grievances corroborate and support Davies' testimony that Craig referred to the new safety policy during the Lieljuris meeting and based her discipline on the new safety policy.

The Respondent contends that it had not adopted the new safety policy prior to the Lieljuris discipline. This contention is credited, especially in light of Craig's statement to Davies in the Lieljuris disciplinary meeting that the Respondent was then working on the new policy. Nevertheless, without regard to whether the Respondent had formally adopted the new safety policy, the disciplinary rules set forth in that policy were applied in imposing discipline on Lieljuris. This conclusion is established by Craig's statement to Davies that suspension is the appropriate discipline under the new policy, by the consistency of the discipline imposed on Lieljuris with the new safety policy, and by the grievances filed by Lieljuris in which she objected to the implementation of the new policy without bargaining with the Union.

On September 20, driver Albert Delsantro was involved in an accident while driving the Respondent's bus in New Jersey. Craig decided that this accident was preventable. Moreover, Delsantro received a careless driving citation from the New Jersey State Police in connection with this accident. (Delsantro was later found not guilty of this offense.) Delsantro had begun his employment for the Respondent in February 2001. He had one other preventable accident and two nonpreventable accidents during his employment with the Respondent, and he had twice been counseled.

On September 27, Delsantro, Davies, and Craig met to determine the discipline to be imposed for this accident. Craig again referred to the new safety policy, and added that the insurance company was watching. Craig told Davies and Delsantro that termination was called for under the new safety policy guidelines. Several days before the meeting, Craig had talked to Daecher concerning the discipline to be imposed on Delsantro. Daecher had previously provided the Respondent with his first draft of the new safety policy, and Craig telephoned Daecher on September 24 in which they discussed the appropriate discipline for Delsantro. Daecher told Craig that Delsantro had to be terminated. Accordingly, Craig told Davies in the meeting that the new safety policy guidelines required Delsantro to be terminated. Davies requested a copy of the new policy, and Craig responded that Daecher was working on it and that Craig would get Davies a copy. Davies again protested the implementation of this new policy without giving the Union a chance to negotiate or to have any input. Craig responded that he would get back to Davies on this request.

On September 27, Delsantro filed a grievance over his discipline and cited the absence of a policy that required such discipline. On the same date, Davies also filed a grievance on behalf of all members of the bargaining unit. This grievance noted the Respondent's failure to have a disciplinary policy regarding safety and the Respondent's implementation of the new safety policy without bargaining. Davies had often complained to the Respondent about its lack of a disciplinary policy on safety matters. However, the Respondent had not bargained with the Union concerning the new policy, and Lieljuris' disciplinary meeting was the first time Davies learned that the Respondent had implemented or was applying a new safety policy. And the Respondent's application of its new safety policy was confirmed and repeated in the Delsantro disciplinary meeting and in the resulting grievances.

Craig testified that he knew nothing about a new company policy until October. This testimony is not credible, especially in light of Craig's consultation with Daecher concerning the discipline to be imposed on Delsantro. The Respondent had hired Daecher to prepare a safety policy, and Daecher had already prepared a draft of the policy. Daecher had delivered a draft of

the safety policy to the Respondent several weeks before Craig's disciplinary meetings with Lieljuris and Delsantro. Craig's consultation with Daecher before imposing discipline on Delsantro shows that Craig was aware of the policy and of Daecher's role in preparing the policy. Craig's consultation with Daecher also demonstrates Craig's intent to comply with the policy in disciplining Delsantro.

In weighing the credibility of Davies' versus Craig's testimony regarding statements made in the disciplinary meetings, I have also considered that Davies is a current employee of the Respondent. Where such testimony is adverse to the employer, it is considered to be against the employee's self-interest, and therefore more worthy of belief. *Stanford Realty Associates, Inc*., 306 NLRB 1061, 1064 (1992).

The disciplines imposed on Lieljuris and Delsantro were consistent with the new safety policy Daecher had prepared for the Respondent. Under the policy, a driver who had two preventable accidents in 24 months was to receive a suspension and remedial training, which is precisely what Lieljuris received. (GC Exh. 2, p. 8.) Under the policy, a driver who had a preventable accident involving reckless driving or other irresponsible behavior was to be terminated. Craig determined that Delsantro's accident was preventable, and in denying Delsantro's grievance, Craig noted that Delsantro was cited for careless driving. (GC Exh. 6.) Accordingly, consistent with the safety policy and in accordance with Daecher's direction to Craig, Delsantro was terminated.

As noted above, on September 5, Daecher sent the initial draft of the safety policy to each of the Respondent's various locations. Wilkes-Barre's safety policy was personally delivered to Pleiscott on that date. After making several revisions in September and October, Daecher completed the safety policy in late October. The policy was presented to the Respondent in late October or early November as a completed document. Indeed, Pleiscott admitted that "[t]here were no negotiations at which the Union was involved in determining or agreeing to what was to be contained in the new policy. When the copy of the new policy was given to the Union, it was a completed document." (GC Exh. 9, pp. 2–3; R Exh. 5.) Later in November, when Davies and Craig were conversing about an unrelated matter, Craig handed a shortened version of the safety policy to Davies, stating, "This is our policy, it's already done." (Tr. 22.) This is the first time the Union had seen the safety policy. Notwithstanding Craig's comment, Davies told him the Union would review it and let him know if it was acceptable. Several days later, Davies told Craig that there were certain provisions of the safety policy that the Union could not accept. Craig made notes of these provisions, and told Davies that he (Craig) would get back to him.

The shortened version of the policy handed to the Union in November included the complete disciplinary policy that is contained in the longer version. There is no evidence that any aspect of this disciplinary policy was ever changed from the date it was first presented to the Respondent by Daecher on September 5.

Craig did not get back to Davies on the safety policy until approximately January 2002. He then told Davies that he had spoken with Pleiscott about the Union's objections, but Pleiscott would not negotiate the safety policy. Craig reported Pleiscott had said that Martz was their company, the safety policy was their policy, and "there would be no negotiations, you have to live with it." (Tr. 25.) Davies told Craig that the Union could not accept the company's position and it would take the matter further. Accordingly, on February 19, 2002, the Union filed an unfair labor practice charge with the National Labor Relations Board.

Soon after the unfair labor practice charge was filed, the Respondent, in an apparent

reversal of its position, scheduled a meeting with the Union to be held in Pleiscott's office. This meeting was held in late February 2002. Present were Pleiscott, Craig, Davies, and another Union official. The parties discussed and bargained over the safety policy. Certain tentative agreements on different aspects of the safety policy were reached, but the parties could not agree on the appropriate discipline, if any, for Lieljuris and Delsantro. Accordingly, the parties did not reach an agreement on the safety policy and no further negotiating sessions were held. Several days after this February meeting, Craig telephoned Davies and told him, "If you pursue this, they're going to take your safety bonuses away from you." Davies responded, "Joe, do what you have to do because I'm not accepting it the way it is and I am going to push it." (Tr. 26-27.) About 2 weeks later, after a meeting in March 2002 on an unrelated matter, Pleiscott told Davies that the Respondent had decided to eliminate the safety bonus program. Accordingly, bonuses were not paid for the first quarter of 2002.

In resolving whether Craig threatened Davies with the elimination of the bonuses if the Union continued to pursue its unfair labor practice charge, I have considered all the surrounding circumstances, as well as the demeanor of the witnesses. Relevant circumstances include the following. The Union, through Davies, had often asked the Respondent to propose and negotiate a safety policy, but the Respondent had always refused. In September, the Respondent applied its new safety policy in two employee disciplines, and in January 2002, the Respondent instituted the safety policy, but it did so without even informing the Union, let alone negotiating with it. The Respondent likely knew it had violated its duty to bargain, which is shown by its change of position and willingness to negotiate soon after the unfair labor practice charge was filed. A threat to retaliate for the filing of a charge is more likely to have occurred if the charge is meritorious, and the Union's charge was meritorious and the Respondent knew it was meritorious. Moreover, the Respondent evidently did not want to negotiate its safety policy, in spite of its legal obligation to do so. This is demonstrated, on the one hand, by the Union's frequent requests that a safety policy be instituted and that it be allowed to bargain over such a policy. On the other hand, the Respondent refused to bargain over the safety policy, and refused to provide the Union with a copy of the policy until after it had been completed. Under these circumstances, the likelihood of a threat to retaliate is increased. In light of Davies' positive recollection of the threat being made, and considering his demeanor and all of the other circumstances, I conclude that Craig did threaten Davies, after the charge had been filed, by telling him, "If you pursue this, they're going to take your safety bonuses away from you." This threat was followed up by the retaliatory act itself, the elimination of the safety bonuses.

The subject of safety or incentive bonuses first appeared in the December 1995 collective-bargaining agreement between the Respondent and the Union. Bonuses were awarded at the sole discretion of the Respondent, could be terminated or changed at any time, and were not subject to grievance or arbitration. Bonuses were paid quarterly, and the maximum quarterly bonus was $125. Bonuses were paid for safety as well as other factors concerning a driver's performance. A preventable accident would disqualify a driver from being eligible for a bonus.

The Respondent had considered eliminating the safety bonus program since 1999. Chisdock, the operations manager and the person who was responsible for administering the bonus program, had been opposed to the program from the date he started employment with the Respondent in 1998. Since 1999 or 2000, Henry, the Respondent's president, and Pleiscott, the Respondent's chief executive officer, were opposed to the program. There is no evidence of any manager who had ever been in favor of the bonus program. On the other hand, Daecher, who had been retained in 2001 to devise a safety policy, was in favor of a safety bonus program. Indeed, Daecher had recommended safety bonuses to Pleiscott as part of Daecher's proposed safety program. Thus, it is curious why the Respondent continued to pay bonuses to

its drivers from 1996 through 2001, in the face of virtual unanimous and long-standing opposition from management. Moreover, the Respondent had the unfettered discretion to eliminate the bonus program at any time, yet eliminated the program soon after the safety consultant, who it had recently hired and to whom it was paying $50,000, advised the Respondent that the program should be kept.

The Respondent maintains that the reason it eliminated the safety bonus program was the substantial wage increase for drivers contained in the collective-bargaining agreement that was signed in January 2002. That agreement provided for the biggest wage increase, which was close to 10 percent, the Respondent had ever given its drivers. Pleiscott, who made the decision to eliminate the bonus program, testified that he decided during the contract negotiations to eliminate the bonuses as a way to pay for the wage increase. Nevertheless, the collective-bargaining agreement listed the bonus program as an incentive program the Respondent intended to provide its drivers during the term of the agreement. Moreover, Pleiscott did not advise the Union of his decision to eliminate the bonus program during the contract negotiations.

Under all the circumstances, I conclude that Pleiscott's testimony that he decided to eliminate the bonus program during the contract negotiations in January 2002 is not credible. Pleiscott's failure to mention the elimination of the program during negotiations, the inclusion of the program in the collective-bargaining agreement, the Respondent's alleged, long-standing dissatisfaction with the program without taking any action to eliminate or change it, and Daecher's recent endorsement and encouragement of the safety bonus program, all support the conclusion that Pleiscott had not formed the intent during the negotiating sessions in January 2002 to eliminate the safety bonus program. It may be that, during contract negotiations, Pleiscott had thought about possibly eliminating the bonus program as one way to help pay for the wage increase, but the circumstances show that he did not make a definite decision to eliminate the bonus program at that time. The decision was made later.

Chisdock, pursuant to his duties as the general manager for the Wilkes-Barre facility, administered the safety bonus program and made the final decisions on the drivers who would receive bonuses. Yet, Chisdock was not informed that the bonus program would be eliminated until late March 2002, not long before the first quarter bonuses would have been paid. As Chisdock explained, "I really didn't know until it was about the time to issue it [the bonuses]." (Tr. 197.) This occurred even though Chisdock claims that he was part of management's discussions during contract negotiations regarding the elimination of the bonuses. If Pleiscott had formed the intent to eliminate the bonuses in January, it is likely he would have advised Chisdock of this fact at the negotiating sessions, and at least before the end of March when Chisdock was about to issue the bonuses.

Also, the Respondent's rationale for its elimination of the bonuses has changed over time. When Pleiscott told Davies that bonuses would no longer be paid, the only explanation given by Pleiscott was that the bonuses "weren't doing exactly what they were supposed to do." (Tr. 28.) However, at the hearing in this case, Pleiscott explained that the bonuses were eliminated because of the wage increases in the new collective-bargaining agreement. This latter explanation appears to be reasonable, and there is no apparent reason why it would not have been disclosed to Davies if it were true. For all the foregoing reasons, the wage increases in the new collective-bargaining agreement were not the reason the bonuses were eliminated. Moreover, the Respondent did not form the intent to eliminate the bonuses until shortly before they were eliminated.

III. Analysis

a. *Implementation of the policy*. Sections 8(a)(5) and 8(d) of the Act require an employer to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." An employer violates Section 8(a)(5) and (1) of the Act if it unilaterally alters the terms and conditions of employment without bargaining while a collective-bargaining agreement is in place. *See Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). Work rules that can be grounds for discipline are mandatory subjects of bargaining. *King Soopers, Inc*., 340 NLRB No. 75 (2003). Nevertheless, a unilateral change in a mandatory subject of bargaining is unlawful only if it is "material, substantial, and significant." *Alamo Cement Co*., 281 NLRB 737, 738 (1986).

The strict enforcement of a preexisting work rule is a material, substantial, and significant change in the terms of employment. *Flambeau Airmold Corp*., 334 NLRB 165 (2001). Moreover, the conversion of an informal policy into a hard and fast policy, the violation of which would subject employees to discharge, constitutes a material, substantial, and significant change in the terms of employment. *Scepter, Inc. v. NLRB*, 280 F.3d 1053 (DC Cir. 2002), enfg. 331 NLRB 1509 (2000).

Before September 2001, the Respondent had no policy regarding the discipline of drivers for accidents or other infractions. Discipline was administered haphazardly and inconsistently. In January 2002, at the latest, the Respondent implemented the safety policy that had been developed, revised, and completed by Daecher. The policy was implemented without negotiating with the Union. The policy is quite comprehensive and includes a detailed listing of the discipline to be imposed on drivers for moving violations, preventable accidents, complaints, unacceptable road observation reports, and other violations.

The Respondent's safety policy is a mandatory subject of bargaining, and its implementation constituted a material, substantial, and significant change in the terms of employment. Accordingly, by implementing the safety policy without negotiating with the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

b. *The September disciplines*. If an employer unlawfully and unilaterally imposes new disciplinary rules against its employees, at least to the extent that such disciplinary rules are a factor in the discipline and discharge of the employees, the discipline and discharge violate Section 8(a)(5). *Great Western Produce*, 299 NLRB 1004, 1005 (1990).

The disciplinary policy in the Respondent's new safety policy was a factor in the disciplines received by Lieljuris and Delsantro in September. Indeed, the policy was not only a factor, it was a determinative factor in the disciplines that were imposed. In the disciplinary meeting with Davies and Lieljuris, Craig justified the discipline imposed on Lieljuris by citing only the new safety policy. Craig called Daecher before the Delsantro disciplinary meeting, and Daecher told him that Delsantro had to be fired. Craig followed this direction and told Delsantro and Davies that Delsantro's termination was called for under the new safety policy guidelines.

The application of the new safety policy to the Lieljuris and Delsantro disciplines is also corroborated by the consistency of the disciplines with the policy. The safety policy mandates suspension and remedial training for Lieljuris' accident and termination for Delsantro's accident. The disciplines imposed on Lieljuris and Delsantro complied with these directives of the safety policy.

The Respondent contends that the safety policy was not in effect in September when the Lieljuris and Delsantro disciplines occurred and, therefore, could not have been used as a factor or basis for the disciplines. This argument assumes that a policy must first be formally adopted before its provisions can be applied. Logically and practically, there is nothing that prevents a policy from being applied before it is formally adopted. If the Respondent's argument were correct, an employer could change its terms and conditions of employment at will without incurring the obligation to bargain, as long as it avoided formally implementing the policy. The Respondent's statutory obligation to bargain cannot be so easily avoided through such contrivances. Indeed, the bargaining obligation is violated, and the resulting discipline is unlawful, when unlawful rules or policies are "imposed," not only when they might be formally adopted or implemented. Id. The Respondent's new safety policy was imposed in September by its application to the disciplines of Lieljuris and Delsantro. Accordingly, the disciplines in those cases were unlawful.

The Respondent's argument that the new safety policy was not used as a basis for its disciplines of Lieljuris and Delsantro raises another issue, viz., whether the Respondent would have imposed the same disciplines without regard to the unlawfully imposed safety policy. A Respondent's defense to reinstatement may be presented at the compliance stage. *Great Western Produce*, supra at 1005 fn. 10. However, the defense may also be considered in the unfair labor practice proceeding if the Respondent has presented its defense in that proceeding. *Consec Security*, 328 NLRB 1201 (1999).

The General Counsel argues that the evidence fails to show that Lieljuris and Delsantro would have received the same disciplines in the absence of the new safety policy. This argument is based, in part, on the Respondent's previous lack of a disciplinary policy, and its failure to consistently discipline drivers for accidents and other transgressions. Nevertheless, I conclude that the Respondent has not been given adequate notice to present its defense to a reinstatement order. Although one could infer from the Respondent's defense (that the new safety policy was not applied in the subject disciplines) that the Respondent did present its defense to reinstatement, I am unwilling to decide the issue based on such an inference. Accordingly, any defense the Respondent may have to reinstatement may be presented at the compliance stage. *Great Western Produce*, supra at 1005 fn. 10.

The Respondent's unlawfully imposed safety policy was a factor in the disciplines of Lieljuris and Delsantro. Accordingly, the disciplines violated Section 8(a)(5) and (1) of the Act.

c. *Threat to eliminate safety bonuses*. A threat to employees in retaliation for filing charges under the Act violates Section 8(a)(1). *Norris Concrete Materials*, 282 NLRB 289 (1986). On February 19, 2002, the Union filed an unfair labor practice charge against the Respondent. Later in February, the Union and the Respondent met and bargained over the Respondent's safety policy; however, the parties were unable to reach an agreement. Several days later, Craig told Davies, "If you pursue this, they're going to take your safety bonuses away from you." This statement is clearly a threat. The only question is whether the threat referred to the Union's action in filing charges with the Board, and thereby interfered with the employees' protected rights, or whether the threat referred to some other activity, such as the Union's position in the recently disbanded negotiations.

The evidence compels the conclusion that Craig's threat referred to the Union's protected activity in filing charges with the Board. The Respondent does not argue that the threat was ambiguous or referred to anything other than the Union's charge. Rather, the Respondent argues that Craig did not make the statement. However, that contention was rejected in the factual findings set forth above. Moreover, the threat was made shortly after the

Union had filed its unfair labor charge. Also, in context, the statement "if you pursue this" more likely refers to charges filed with the Board rather than a position the Union may have taken in negotiations. In addition, Craig mentioned the Union's unfair labor charge to Davies during the conversation in which he made the threat, and Davies, to whom the threat was made, understood that the threat referred to the Union's unfair labor practice charge. For all of these reasons, Craig's threat referred to the Union's unfair labor practice charge before the Board and this threat threatened retaliation for prosecuting that charge. Accordingly, the threat violated Section 8(a)(1) of the Act.

d. *The Respondent's elimination of safety bonuses*. Under Section 8(a)(4) and (1) of the Act, it is an unfair labor practice for an employer to retaliate against employees because they or their collective-bargaining agent file unfair labor practice charges against the employer. *Summitville Tiles, Inc*., 300 NLRB 64 (1990). The Board and the courts apply the Board's *Wright Line* analysis to these charges. *Caterpillar, Inc*., 322 NLRB 674 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

The General Counsel has the initial burden of proving four elements: (1) the existence of protected activity; (2) knowledge by the Respondent; (3) an adverse employment action; and (4) a motivational link between the protected activity and the adverse employment action. *American Gardens Management*, 338 NLRB 76 (2002). The Respondent does not dispute the first three elements, and I conclude that these elements have been established. The Respondent argues the fourth element has not been proven because the evidence shows that Pleiscott had formed the intent to eliminate the safety bonuses in January, during negotiations with the Union over the most recent collective-bargaining agreement. Accordingly, the Respondent argues that it did not eliminate the safety bonuses in retaliation for the Union's filing of labor charges with the Board, but rather, to help pay for the wage increase granted in January.

The Respondent's argument seems to conjoin the General Counsel's burden of proof regarding the fourth element of its prima facie case with the Respondent's burden of establishing, once a prima facie case has been proven, that the same action would have been taken absent the protected activity. Nevertheless, I will consider the Respondent's contention under both aspects of the analysis, keeping in mind that the General Counsel has the ultimate burden of proving an unlawful motivation for the elimination of the safety bonuses.

The motivational link between the protected activity and the adverse employment action may be established through direct and indirect, or circumstantial, evidence. The direct evidence of the Respondent's motivation could hardly be more clear. Craig told Davies that if he were to pursue the unfair labor practice charge, the Respondent would take away the safety bonuses. Davies responded that he intended to pursue the charge that had been filed with the Board. Indeed, Davies told Craig that he intended to "push it." About 2 weeks later, Pleiscott told Davies that the safety bonus program had been eliminated. The direct threat, which referred to the unfair labor practice charge, followed shortly thereafter by the threatened action, establishes the motivational link.

The indirect evidence also establishes the motivational link. For example, shifting explanations is evidence of unlawful motivation, and the Respondent's explanation for eliminating the bonuses has changed from what it first told Davies to its present contention. Moreover, timing is an important factor and may be sufficient in itself to establish unlawful motivation. *Grand Central Partnership*, 327 NLRB 966 (1999). In the present case, the timing is compelling. The bonuses were eliminated shortly after Craig made his threatening statement to Davies. In addition, for years management had disfavored the safety bonuses, but it had not

eliminated the bonuses despite its discretion to do so. On the other hand, the safety consultant hired by the Respondent had recently recommended that the safety bonuses be retained. Pleiscott did not form the intent to eliminate the safety bonuses during the contract negotiations in January. His intent was formed later. Craig's threat to Davies explains and confirms when and why his intent to eliminate the safety bonuses was formed.

The General Counsel has proven that the Respondent eliminated the safety bonuses in retaliation for the Union's prosecution of its unfair labor charge before the Board. The evidence also demonstrates that the Respondent would not have taken the same action absent the protected activity by the Union. Accordingly, the Respondent has violated Section 8(a)(4) and (1) of the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by implementing its safety policy without negotiating with the Union and by using that safety policy to discipline Syndia Lieljuris and Albert Delsantro.

4. The Respondent violated Section 8(a)(1) of the Act by threatening to eliminate its safety bonus program for its employees if the Union continued to prosecute its unfair labor practice charge before the Board.

5. The Respondent violated Section 8(a)(4) and (1) of the Act by eliminating its safety bonus program in retaliation for the Union's continued prosecution of its unfair labor practice charge before the Board.

6. The foregoing violations constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged Albert Delsantro, I shall order that the Respondent offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, The Frank Martz Coach Company, Inc., Wilkes-Barre, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith, within the meaning of the Act, with Amalgated Transit Union, Division 1119, AFL–CIO, Local 668 (the Union) concerning the implementation of its safety policy.

(b) Unilaterally implementing the safety policy that was unlawfully implemented until it has bargained in good faith, within the meaning of the Act, with the Union.

(c) Threatening its employees with retaliation if they, or their collective-bargaining representative, file or prosecute unfair labor practice charges before the Board.

(d) Retaliating against its employees for their, or their collective-bargaining representative's, filing or prosecuting unfair labor practice charges before the Board.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind at the request of the Union the safety policy that was unlawfully implemented.

(b) Bargain in good faith until an agreement is reached, or to good-faith impasse, before implementing the safety policy.

(c) Reinstate the safety bonus program that was unlawfully rescinded, and make employees whole for lost safety bonuses from the first quarter of 2002 until such time that the safety program is lawfully rescinded.

(d) Within 14 days from the date of this Order, offer Albert Delsantro full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Albert Delsantro whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplines of Syndia Lieljuris and Albert Delsantro, and within 3 days thereafter notify Syndia Lieljuris and Albert Delsantro in writing that this has been done and that the disciplines will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Wilkes-Barre, Pennsylvania, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 20.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 1, 2004

Joseph Gontram
Administrative Law Judge

[6] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to bargain in good faith, within the meaning of the Act, with Amalgated Transit Union, Division 1119, AFL–CIO, Local 668 (the Union) concerning the implementation of a safety policy.

WE WILL NOT unilaterally implement the safety policy that was unlawfully implemented until we have bargained in good faith, within the meaning of the Act, with the Union.

WE WILL NOT threaten employees with retaliation if they, or their collective-bargaining representative, file or prosecute unfair labor practice charges before the National Labor Relations Board.

WE WILL NOT retaliate against employees for their, or their collective-bargaining representative's, filing or prosecuting unfair labor practice charges before the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind, at the request of the Union, the safety policy that was unilaterally and unlawfully implemented.

WE WILL bargain in good faith until an agreement is reached, or to good-faith impasse, before implementing the safety policy.

WE WILL reinstate the safety bonus program that was unlawfully rescinded and make employees whole for lost safety bonuses from the first quarter of 2002 until such time that the safety program is lawfully rescinded.

WE WILL within 14 days from the date of the Board's Order offer Albert Delsantro full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Albert Delsantro whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL within 14 days from the date of this Order remove from our files any reference to the

unlawful disciplines of Syndia Lieljuris and Albert Delsantro and within 3 days thereafter notify Syndia Lieljuris and Albert Delsantro in writing that this has been done and that the disciplines will not be used against them in any way.

The Frank Martz Coach Company, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404
(215) 597-7601, Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-7643.